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## Stories of Rights: Developing Moral Theory and Teaching Law

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# STORIES OF RIGHTS: DEVELOPING MORAL THEORY AND TEACHING LAW

Patricia A. Cain\*

Jean C. Love\*\*

RIGHTS, RESTITUTION, & RISK: ESSAYS IN MORAL THEORY. By Judith Jarvis Thomson. Edited by William Parent. Cambridge, Mass.: Harvard University Press. 1986. Pp. x, 260. \$12.95.

## I. INTRODUCTION

Judith Jarvis Thomson is a teacher of philosophy and we are law school teachers. As teachers in different but related disciplines, we share a common pedagogical approach: use of the case method. In law, our cases are stories of real-life struggles with real-life resolutions. But in the law school classroom, the creative teacher will often push beyond the real life story. In Socratic fashion, the law school teacher will pose a series of hypotheticals to test the students' understanding of the case. Often the law school teacher prepares for class by searching for the perfectly framed hypothetical. Judith Jarvis Thomson is the quintessential expert at creating the perfectly framed hypothetical. Her most well-known hypothetical is "The Famous Violinist." It is intended to pose the problem of abortion in a different light. She asks you to imagine this:

You wake up in the morning and find yourself back to back in bed with an unconscious violinist. A famous unconscious violinist. He has been found to have a fatal kidney ailment, and the Society of Music Lovers has canvassed all the available medical records and found that you alone have the right blood type to help. They have therefore kidnapped you, and last night the violinist's circulatory system was plugged into yours, so that your kidneys can be used to extract poisons from his blood as well as your own. The director of the hospital now tells you, "Look, we're sorry the Society of Music Lovers did this to you — we would never have permitted it if we had known. But still, they did it, and the violinist now is plugged into you. To unplug you would be to kill him. But never mind, it's only for nine months. By then he will have recovered from his ailment, and can safely be unplugged from you." Is it morally incumbent on you to accede to this situation? [pp. 2-3]

*A Defense of Abortion*, the first essay in *Rights, Restitution, & Risk*,

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begins with this story of the famous violinist. The reader will at once see the many ways in which a person's being plugged to the famous violinist is like and unlike a pregnant woman's being plugged to her unborn child.

And if "The Famous Violinist" does not capture your imagination, then consider the case of people-seeds which "drift about in the air like pollen, and if you open your windows, one may drift in and take root in your carpets or upholstery. You don't want children, so you fix up your windows with fine mesh screens, the very best you can buy" (p. 12). But, as sometimes happens, one of your screens is defective and so a seed drifts through and takes root in your living room. Does it have the right to stay?

Welcome to the world of Judith Jarvis Thomson, a world inhabited by famous violinists, people-seeds, and just plain ordinary folk like Alfred and Bert. Alfred pours cleaning fluid into his wife's coffee (wishing her dead, of course), whereas Bert merely stands by and watches his wife mistakenly pour cleaning fluid into her own coffee (wishing her dead, of course). Does Alfred do a thing that is worse than what Bert does? Is killing worse than letting die? (p. 78).

William Parent, the editor of *Rights, Restitution, & Risk*, is to be commended for collecting Thomson's essays on moral theory, thereby making them available in a single volume. His choice was to organize the essays by topic, rather than chronologically. Most of the essays are about "rights." Thomson's concept of "rights" is something that has developed over time. Thus, the reader may find it helpful to note the dates of original publication of these essays by referring to the list of sources at the end of the book.

Thomson is fascinated with the meaning of the "right to life," a fascination she readily admits (p. 22). She is also intrigued by the meaning of property rights (pp. 49-77). In her afterword, she suggests that, when confronted with a puzzling concept, one should ask for its cash value. Thus she poses the question: "What is the cash value of having a right?" (p. 252). Throughout the book, Thomson makes repeated connections between rights to life and property and the legal entitlement to compensation for a violation or infringement of those rights. It is her emphasis on this connection between rights and the cash value of rights that appears to have given rise to the book's title.

What the title does not capture is the fact that this collection of essays is really a collection of stories. Yet this may be the most important feature of Thomson's writing. As she explains in the afterword:

The reader of these essays will see that I regard examples, stories, cases — whether actual or invented — as of central importance to moral theory. . . . There are two reasons for thinking them of central importance. In the first place, we do not even know what accepting this or that candidate moral principle would commit us to until we see what it

tells us about what people ought or ought not do in this or that (so far as possible) concretely described set of circumstances.

Second, and more interesting, it is precisely our moral views about examples, stories, and cases which constitute the data for moral theorizing. [p. 257]

Examples, stories, and cases are the tools of both the law school teacher<sup>1</sup> and the moral theorist. Thomson, as moral theorist, provides us with tools that work especially well in two of the law school courses that we are currently teaching. Those courses are torts and feminist legal theory. In the next two sections, we will present our separate thoughts on the richness that Thomson's stories can add to these courses. In the concluding section, we will warn of the risk of stripping stories of their context — a risk that may be shared by the moral theorist and the law professor.

## II. TORTS<sup>2</sup>

### A. *Rights and Wrongs*

In the afterword to *Rights, Restitution, & Risk*, Thomson asserts that "[c]ontact with law has been immensely enriching to moral theory in recent years" (p. 257). Why? Because the purpose of moral theory is to examine human action, and to explain "what makes those acts right which are right, and what makes those acts wrong which are wrong" (p. 256).

Although one might expect moral theory to be simple, Professor Thomson emphasizes that one of the central messages of her essays is "precisely that a moral theory adequate to its explanatory job is going to have to be a more complex affair than we might have expected it to be" (p. 255). When she wants to remind herself of the complexity and variety of human responses to a moral problem, she turns to the literature of the law. By her account, casebooks are "anthologies of short stories, each of which ends in a moral problem" (p. 256). She values cases both for their facts and for the judges' arguments in support of their decisions (p. 256).

As a torts professor, I was delighted to discover that many of Professor Thomson's essays are based on classic tort cases that appear in the standard casebooks.<sup>3</sup> After reading and rereading *Rights, Restitu-*

1. See, e.g., Robertson, *The Legal Philosophy of Leon Green*, 56 TEXAS L. REV. 393, 422-23 (1978). Robertson notes:

A case may comprehend all the important processes of government much as a single drop of water mirrors a universe, or the life of a single human being has within itself the history of mankind. . . .

. . . If the student gains the power to read a case . . . he [or she] inevitably becomes a critic and thereby develops his [or her] creative power.

*Id.* at 422-23.

2. Professor Love wrote this section.

3. For example, *Some Ruminations on Rights*, p. 48, and *Rights and Compensation*, p. 66, are

tion, & Risk, I became convinced that contact with Professor Thomson's essays could be immensely enriching to the teaching of tort law. In this section, I aim to make Professor Thomson's essays more accessible to torts professors by summarizing several of them, and discussing how these essays might be incorporated into a typical law school classroom discussion.

As a moral theorist, Professor Thomson is particularly interested in the subject of rights (p. 251). Several of her essays consider the question: "What have you *got* when you've got a right?" (p. 251). She believes that this question must be resolved before we can respond in a reasoned way to another question: "[W]hat rights [do] we have?" (p. 251). Torts professors, of course, are extremely concerned about both questions. It is true that the term "tort" is usually defined as a "civil wrong."<sup>4</sup> It is also true that some people "think of the law of [t]orts as the law of wrongs."<sup>5</sup> Nevertheless, torts "might better be said to be a law for the creation and protection of rights."<sup>6</sup> In Professor Seavey's words, the "function [of tort law] has continuously been to mark out new areas for the protection of human interests."<sup>7</sup> Tort law enforces rights through awards of damages or equitable relief for legal harms suffered as the result of another person's breach of a duty which is the correlative of a right.<sup>8</sup> Since tort law deals with rights and duties, the concept of a right and its function in the legal decisionmaking process is of great significance to torts professors.

Professor Thomson is fascinated by the question of whether rights are absolute, and if not, what it means to have a right. In considering these questions, she draws extensively on the intentional tort literature involving the privileges of self-defense and necessity.

### B. *Self-Defense*

In her essay *Self-Defense and Rights* (p. 33), Professor Thomson examines the "right to life," which presumably includes "the right to not be killed" (p. 33). If Aggressor has a right to life, she wants to

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based on the classic private necessity cases. See *Vincent v. Lake Erie Transp. Co.*, 109 Minn. 456, 124 N.W. 221 (1910); *Ploof v. Putnam*, 81 Vt. 471, 71 A. 188 (1908). *Remarks on Causation and Liability*, p. 192, is based on two classic cases regarding causation and multiple defendants. See *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948); *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980).

4. W. KEETON, D. DOBBS, R. KEETON, D. OWEN, PROSSER & KEETON ON TORTS § 1, at 2 (5th ed. 1984) [hereinafter PROSSER & KEETON].

5. W. SEAVEY, COGITATIONS ON TORTS 5 (1954).

6. *Id.*

7. *Id.* Professor Seavey goes on to say that to speak of torts as the law of wrongs is to misconceive its function. Instead, it "should be regarded as a body of rules which provide compensation for harm caused by another." *Id.* at 6.

8. See generally PROSSER & KEETON, *supra* note 4, § 1, at 2; 1 S. SPEISER, C. KRAUSE & A. GANS, THE AMERICAN LAW OF TORTS §§ 1.8-1.9 (1983); Coval & Smith, *Rights, Goals, and Hard Cases*, 1 LAW & PHIL. 451, 451-52 (1982).

know “[p]recisely *why* [it is] permissible for Victim to use [an] anti-tank gun on Aggressor” when Aggressor is driving a tank toward victim with the intent of killing Victim (p. 33). As a way of considering this question, she evaluates the three alternative explanations that are typically put forward to justify the privilege of self-defense.

The first explanation she calls “forfeit” (p. 33). Under this theory, Aggressor has forfeited his right to life by attacking Victim. Thomson finds this theory totally unsatisfactory because it suggests that Victim could shoot Aggressor even if Aggressor’s tank stalled and Aggressor got out to examine the engine, falling and breaking both ankles (pp. 33-34).

The second explanation she calls “specification,” including both moral and factual specification (p. 37). Friends of specification say that having a right to life *doesn’t* include having a general right to not be killed. Instead, having a right to life includes having a right to not be killed under specified circumstances (p. 37). Moral specification says that having a right to life includes having a right to not be killed wrongly or unjustly (p. 37). Factual specification says that having a right to life includes having a right to not be killed only under certain circumstances (p. 38). For example, “all you have is a right to not be killed if you are not in [the] process of trying to kill a person, where that person has every reason to believe he can preserve his life only by killing you” (p. 38).

Thomson used to be a friend of moral specification (p. 37). However, she has now abandoned this justification for the privilege of self-defense. She offers the following clear and witty explanation of her dissatisfaction with moral specification:

Consider Victim. We were asked to explain why it is permissible for Victim to use his anti-tank gun on Aggressor, thereby killing him; and consider the following answer: “The reason why it is permissible for Victim to kill Aggressor is that Aggressor has no right to not be killed — he only has a right to not be killed wrongly or unjustly — and in killing Aggressor, Victim would not be killing Aggressor wrongly or unjustly.” One does not mind all circles, but this circle is too small. [p. 37.]

Thomson is even less enamored of the factual specification theory (p. 38). It, too, leads to circular reasoning, because the friend of factual specification has “to figure out when it is permissible to kill, and then tailor, accordingly, his account of what right it is which is the most we have in respect of life” (p. 39).

The third explanation for the privilege of self-defense Thomson calls “overriding” (p. 42). Unlike the first two explanations, which assume that all rights are absolute, the “overriding” theory recognizes that some rights, including the right to life, are nonabsolute (p. 42). An overrider then says: “[T]he reason why it is permissible for Victim to kill Aggressor is the fact that, the circumstances being what they are, Aggressor’s right to not be killed is overridden” (p. 42). By what

is Aggressor's right to life overridden? By the "utility" of Victim's action or by Victim's "more stringent right" to kill a person who is currently giving Victim every reason to believe that he will kill Victim unless Victim kills him (pp. 43-46). But Thomson is not convinced that the benefits of Victim's conduct would always outweigh the costs (p. 43). Nor is she satisfied that there is any principled way in which to determine when Victim's rights are more stringent than Aggressor's (pp. 43-47), particularly if both of them claim a "natural right," that is, "a right a human being has simply by virtue of being a human being" (p. 44).

In short, none of the above three typical explanations for the privilege of self-defense withstand Thomson's scrutiny. She has demonstrated that we don't know what it means to have a "right to life" in a case in which the defendant claims the privilege of self-defense. Even Thomson is surprised at the outcome of her analysis:

I do not for a moment think it a novel idea that we stand in need of an account of just how an appeal to a right may be thought to function in ethical discussion. What strikes me as of interest, however, is that the need for such an account shows itself even in a case which might have been thought to be transparent. [p. 48.]

Assigning or summarizing Professor Thomson's essay could greatly enrich a classroom discussion of the law of self-defense. Most students take it for granted that there is both a right to life and a privilege of self-defense.<sup>9</sup> Thomson's essay will force students to think more carefully about the tension between the two principles. It also will create a springboard for a discussion of other possible explanations for the law of self-defense. For example, Dean Prosser takes the position that the "privilege of self-defense rests upon the necessity of permitting a person who is attacked to take reasonable steps to prevent harm to himself or herself, where there is no time to resort to the law."<sup>10</sup> And Dean Kadish suggests that the privilege of self-defense derives from "the right of every person to the law's protection against the deadly threats of others."<sup>11</sup> He asserts that if this right is to have any content, it must "include maintenance of a legal liberty to resist deadly threats by all necessary means, including killing the aggressor."<sup>12</sup>

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9. In fact, early common law courts (applying principles of strict liability) did not recognize a privilege of self-defense. A slayer who killed in self-defense "deserves, but needs a pardon" in order to avoid a death sentence. 1 F. HARPER, F. JAMES & O. GREY, *THE LAW OF TORTS* § 3.11 (2d ed. 1986) [hereinafter HARPER & JAMES]; C. MORRIS & C. MORRIS, JR., *MORRIS ON TORTS* 33 (1980); PROSSER & KEETON, *supra* note 4, § 19, at 124. Not until approximately 1400 was the privilege of self-defense recognized by the law of crimes and the law of torts. *Id.*

10. PROSSER & KEETON, *supra* note 4, § 19, at 124.

11. Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 CALIF. L. REV. 871, 884 (1976).

12. *Id.* at 884-85. For more general discussions of the law of self-defense and the distinction between justification and excuse, see Dressler, *Justifications and Excuses: A Brief Review of the*

Professor Thomson does not offer her own explanation of the privilege of self-defense. Unlike torts professors, she is less concerned about the law of self-defense and more concerned about what it means to have a right. From her perspective, it is enough that she has proved that the right to life is not absolute (p. 40).

### C. *Private and Public Necessity*

In her next two essays, *Some Ruminations on Rights* (p. 49) and *Rights and Compensation* (p. 66), Thomson explores more fully the question of whether rights are absolute. She recognizes that there are two good reasons for preferring to say that rights are inviolable. First of all, "assertions of rights have a kind of moral force that no other moral assertions do"; "rights are trumps" (p. 254). Second, a moral theory which regards rights as absolute is simpler than one which does not (p. 254). Although she thinks that these are two good reasons for preferring a moral theory that rights are inviolable, she does not think these reasons are good enough because, in fact, very few rights are truly absolute (p. 255). A moral theory which does not allow for the infringement of rights cannot "explain the moral phenomena which need explaining as well as one which does" (p. 255). To prove her point, Professor Thomson turns to the law regarding the defense of private necessity.<sup>13</sup>

Suppose, she says, that you are on a backpacking trip in the high mountain country when a blizzard strikes with such ferocity that your life is imperiled (p. 66). May you trespass on private land, smash in the window of an unoccupied cabin, help yourself to the food supply, and burn the wooden furniture in the fireplace to keep warm? Yes, she says, it is morally and legally permissible for you to do all of these things (pp. 66, 68). Therefore, it is inaccurate to say that the owner of the cabin has an "absolute" right in either the real or the personal property (pp. 55-57).

On the other hand, it would also be inaccurate to say that the cabin owner has "no right" in the property because the law does require that you compensate the cabin owner for the loss of the window, food, and wooden furniture.<sup>14</sup> To explain what needs explaining here, Thomson

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*Concepts and the Literature*, 33 WAYNE L. REV. 1155 (1987); Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949 (1985); Greenawalt, *Distinguishing Justifications from Excuses*, 49 LAW & CONTEMP. PROBS. 89 (Summer 1986); Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984); Horowitz, *Justification and Excuse in the Program of the Criminal Law*, 49 LAW & CONTEMP. PROBS. 109 (Summer 1986).

13. For a summary of the law of private necessity, see RESTATEMENT (SECOND) OF TORTS §§ 197, 263 (1965); 1 HARPER & JAMES, *supra* note 9, at § 1.22; PROSSER & KEETON, *supra* note 4, at § 24; Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality*, 39 HARV. L. REV. 307 (1926).

14. See pp. 40-41, 54, 59, and 253 for Thomson's references to similar fact situations in which compensation would be allowed. Thomson recognizes that full compensation is appropriate in the hypothetical under discussion because you exercised the privilege of private necessity to



distinguishes between violating a right and infringing a right. You infringe a right whenever you interfere with a right; you violate a right only if you infringe it by acting unjustly or wrongly (pp. 40, 51 & n.3). In the case of the cabin owner, you would be infringing some of the cabin owner's property rights, but you would not be violating any of them (p. 54).

Moral theorists will continue to debate what it means to have a right, and whether rights are absolute. Furthermore, they will challenge Judith Jarvis Thomson's assertion that the concept of "infringement of a right" is the "only adequate explanation" for the legal operation of the incomplete defense of private necessity (pp. 253-54). Professor Jules Coleman, for example, takes the position that the privilege of private necessity may be explained equally well by a "more general *principle* of justice" whereby you must pay compensation to the cabin owner for "wrongfully interfering with a legitimate interest," even though you did not violate any "right" of the cabin owner's.<sup>15</sup>

Nevertheless, it seems to me that Thomson's distinction between an "infringement of a right" and a "violation of a right" is useful to torts professors. It helps to explain much of the law regarding private necessity. For example, it helps to explain why the cabin owner may not eject the trespasser (*i.e.*, the trespasser has not violated the owner's real property rights).<sup>16</sup> It also facilitates a student's understanding of why the cabin owner may not obtain nominal damages in an action for trespass to land (no "violation"),<sup>17</sup> but may recover compensatory damages in an action for trespass to chattels (no "violation," but "infringement").<sup>18</sup>

Professor Thomson's analysis of the law of private necessity contains other hypotheticals that will carry the classroom discussion beyond the cases in the standard torts casebooks. For example, she poses the following fact situation:

There is a child who will die if he is not given some drug in the near future. The only bit of that drug which can be obtained for him in the near future is yours. You are out of town, and hence cannot be asked for

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protect your own life. She suggests that if you had exercised the privilege to protect a third party's life or property, however, you might owe the cabin owner less than the full cost of the harm done (p. 54). For a discussion of the latter situation, see text accompanying notes 19-22 *infra*.

15. Coleman, *Moral Theories of Torts: Their Scope and Limits: Part II*, 2 LAW & PHIL. 5, 20-21 (1983) (emphasis in original).

16. See, e.g., *Ploof v. Putnam*, 81 Vt. 471, 71 A. 188 (1908); RESTATEMENT (SECOND) OF TORTS § 197, comment k (1965).

17. See, e.g., *Polebitzke v. John Week Lumber Co.*, 173 Wis. 509, 510, 181 N.W. 730, 732 (1921) (trespass to land action against defendant who entered plaintiff's land to remove his logs that had floated downstream) ("Nominal damages are awarded because a party has sustained an invasion of his rights. Here the plaintiffs' rights were not invaded."); PROSSER & KEETON, *supra* note 4, § 24, at 147-48.

18. *Vincent v. Lake Erie Transp. Co.*, 109 Minn. 456, 124 N.W. 221 (1910); PROSSER & KEETON, *supra* note 4, § 24, at 147-48.

consent within the available time. You keep your supply of the drug in a locked box on your back porch. [pp. 51-52]

If we break into your box, remove the drug, and feed it to the child, we can claim the privilege of private necessity,<sup>19</sup> but we will have to compensate you for the value of the medicine.<sup>20</sup> In *Some Ruminations on Rights*, Thomson questions the propriety of this legal remedy (pp. 64-65). She suggests that, instead of putting the entire burden of meeting the child's need on us, the law should provide that we share the burden with you (p. 65). If she is correct about this, she says "it follows that we need not reimburse you for the entire cost of repairing or replacing the box and replacing the drug, but only such part of that cost as leaves you to pay the same amount as each of the rest of us" (p. 65).

Thomson's hypothetical can be used to encourage the student to think more carefully about the difference between a case in which the defendant invokes the privilege of private necessity to protect his or her own life or property<sup>21</sup> and the case in which the defendant invokes the privilege of private necessity to protect the life or property of another.<sup>22</sup> In the first case, it is appropriate to expect the defendant to reimburse the plaintiff fully for the harm done to the plaintiff's property. In the second case, it may be more appropriate to expect the plaintiff to share with the defendant the cost of protecting the life or property of another threatened by an emergency.

A torts professor might then modify Thomson's hypothetical to create a fact situation that raises the defense of public necessity.<sup>23</sup> For example, there is a city filled with children who will die if they are not given your drug in the near future. You have a very large quantity of the drug in your garage. We break into your garage, remove the drug, and feed it to the children. Because the law allows us to claim the complete privilege of public necessity, rather than the incomplete privilege of private necessity, we are not liable to you for the cost of the drug that we have taken. The law places the entire burden of meeting the children's needs on you.

Students almost certainly will be shocked at this outcome. The hypothetical will enable the torts professor to discuss the reasons for treating the defense of public necessity as a complete defense.<sup>24</sup> It will

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19. RESTATEMENT (SECOND) OF TORTS § 263(1) (1965).

20. *Id.* at § 263(2) & comment e.

21. *Id.* at §§ 197(1)(a), 263(1).

22. *Id.* at §§ 197(1)(b), 263(1).

23. *Id.* at §§ 196, 262; 1 HARPER & JAMES, *supra* note 9, at § 1.16; PROSSER & KEETON, *supra* note 4, § 24, at 146-147; Hall & Wigmore, *Compensation for Property Destroyed to Stop the Spread of a Conflagration*, 1 ILL. L. REV. 501 (1907); Reynolds, *Is "Public Necessity" Necessary?*, 29 OKLA. L. REV. 861 (1976).

24. Dean Prosser explains that public necessity is a complete defense so that the "champion of the public" won't have "to pay for the general salvation out of his [or her] own pocket." PROSSER & KEETON, *supra* note 4, § 24, at 146. Professor Reynolds observes that there are "three reasons for some continued degree of protection from liability for destruction of property

also provide a vehicle for considering whether the law would operate more fairly if it provided a mechanism for us to share the burden of meeting the children's needs with you. That should lead into a discussion of whether it would be even fairer to spread the cost of supplying the drug over all the families of the children who benefited from it, or over all of the citizens of the community.<sup>25</sup> Such a discussion would leave students with a much clearer understanding of the policy considerations behind the law of public and private necessity than can be gleaned by reading *Ploof v. Putnam*,<sup>26</sup> *Vincent v. Lake Erie Transportation Co.*,<sup>27</sup> and *Surocco v. Geary*.<sup>28</sup>

There is another way in which Judith Jarvis Thomson's essays can enrich classroom consideration of the law governing public and private necessity. Most torts casebooks do not include fact situations in which the defendant inflicts death or personal injury in order to save someone's person against an outside threat of harm.<sup>29</sup> A torts professor who wants to explore the application of the privileges of public and private necessity to such fact situations should turn to Thomson's essays entitled *Killing, Letting Die, and the Trolley Problem* (p. 78) and *The Trolley Problem* (p. 94). The core hypothetical in these two essays asks whether it is permissible for Edward to kill in the following case:

Edward is the driver of a trolley, whose brakes have just failed. On the track ahead of him are five people; the banks are so steep that they will not be able to get off the track in time. The track has a spur leading off to the right, and Edward can turn the trolley onto it. Unfortunately, there is one person on the right-hand track. Edward can turn the trolley, killing the one; or he can refrain from turning the trolley, killing the five.  
[pp. 80-81]

Students will need some background information before entering into a discussion of *The Trolley Problem*. The professor should first pose a derivative hypothetical designed to elicit a discussion of the law

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in the face of public calamity": (1) "[T]here is a need for swift action in the face of an impending disaster"; (2) There is a "need to offer protection to public employees"; and (3) There is a "need for special power in wartime." Reynolds, *supra* note 23, at 875-79.

25. Professor Reynolds argues that the "community should respond with compensation for what has been destroyed," perhaps by preparing a plan for "emergency taxation" that would spread the pecuniary loss. Reynolds, *supra* note 23, at 879-81. Professors Hall and Wigmore take the position that the "sacrificed party" should be entitled "to be reimbursed, by the community or portion thereof, to the amount of his [or her] compulsory sacrifice, less the ratable proportion which would fall upon him [or her] as a member of the community or portion thereof." Hall & Wigmore, *supra* note 23, at 514-15 (emphasis omitted). See also PROSSER & KEETON, *supra* note 4, § 24, at 147.

26. 81 Vt. 471, 71 A. 188 (1908).

27. 109 Minn. 456, 124 N.W. 221 (1910).

28. 3 Cal. 69 (1853).

29. No torts casebook asks whether it would be appropriate to inflict death or personal injury in order to save someone's property, presumably because it is "reasonably clear that one would not have even an incomplete privilege to kill an innocent person to save property." PROSSER & KEETON, *supra* note 4, § 24, at 148.

of private necessity. Assume that Edward turns the trolley toward the one. Further assume that, by some miracle, the trolley stops a few feet before it hits the one. Edward gets out. As he steps onto the track in front of the trolley, he looks up and sees a boulder tumbling down the steep bank, coming directly at him. Edward knows that he would be killed or seriously injured if the boulder were to strike him on the head. Behind him is the trolley; on each side of him is a steep bank; ahead of him is the one. Edward runs forward, pushing the one to the ground so that Edward can get out of the way of the falling boulder. The boulder hits the ground between the trolley and the one. The one sustains minor cuts and bruises (as a result of being pushed to the ground); Edward escapes unscathed. In an action by the one against Edward for battery, may Edward invoke the privilege of private necessity? And if so, must Edward nevertheless compensate the one for his cuts and bruises on the theory that private necessity is an incomplete privilege?

The application of the privilege of private necessity to actions for death or personal injury "has received very little consideration."<sup>30</sup> Nevertheless, Professor Fleming speculates that a person in Edward's position could invoke the privilege of private necessity: "It could be . . . that one who is threatened with very serious injury may subject an innocent stranger to slight harm, disproportionately smaller than any from which he is himself trying to escape."<sup>31</sup> Professor Bohlen is of the opinion that, if the privilege of private necessity is to be recognized in such circumstances, it should be characterized as an incomplete privilege.<sup>32</sup> Thus Edward would have to compensate the one for "infringing" his right not to be personally injured, even though Edward did not "violate" any rights of the one because Edward's conduct was "justified" under the circumstances.

After the class has analyzed the derivative hypothetical, the professor should emphasize that Edward would be entitled to invoke the privilege of private necessity only if he inflicted relatively slight harm. Edward could not inflict upon the one "an injury equal, or closely approximate, to that with which he [was] threatened, no matter how impossible it [might have been] for him to otherwise escape the threatened injury."<sup>33</sup>

Returning now to *The Trolley Problem*, Thomson says, "I do not suppose that if the trolley driver turns off to the right, killing the one, then he must pay compensation to the one's heirs" (p. 41). Furthermore, she suggests that the result would be no different if the trolley driver fainted and a bystander threw a switch that turned the brakeless

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30. *Id.*

31. J. FLEMING, *THE LAW OF TORTS* 89 (6th ed. 1983).

32. Bohlen, *supra* note 13, at 321.

33. *Id.* at 319-20 n.18; accord J. FLEMING, *supra* note 31, at 89.

trolley toward the one (p. 96). Why not? Because the law should treat this as a case governed by the complete defense of public necessity?<sup>34</sup> What if there had been fewer than five people on the track ahead? At some point does this become a case governed by the incomplete privilege of private necessity, with damages payable to the survivors of the one?<sup>35</sup> Is it appropriate for tort law to recognize the privileges of public and private necessity at all when human life is at stake?<sup>36</sup> And regardless of how a student would answer the above questions, would the student's answers be different if Edward were a transplant surgeon, and he killed a healthy patient in order to obtain five organs to be transplanted into the bodies of five sick patients?<sup>37</sup>

These are difficult questions indeed.<sup>38</sup> Professor Thomson suggests that both the bystander at the switch and the transplant surgeon would "infringe" the one's "right to life" in the above hypotheticals (p. 106). She then searches for some difference between the cases that would explain why most people think that the bystander may throw the switch, but the transplant surgeon may not operate (p. 106). She concludes that the bystander at the switch is to be distinguished from the transplant surgeon by the following two crucial facts: (1) the bystander at the switch saves his five by making something that threatens them threaten only the one, and (2) the bystander at the switch does not do that by means which themselves constitute infringements of any of the one's rights (pp. 106-07). By contrast, the five patients are threatened by organ failure, and it is not *that* threat which the surgeon transfers to the one healthy patient (p. 107). Moreover, the surgeon who would save the five sick patients by killing the healthy one must

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34. Professor Bohlen suggests that the privilege of public necessity should be recognized when personal interests are invaded "for the purpose of protecting the public interest or of protecting others as well as the actor." Bohlen, *supra* note 13, at 323. In such cases, he takes the position that the privilege should be complete because "the actor should not be required to pay for his privilege by bearing a loss from which he derives no personal advantage, or from which he gets only a small part of the advantage." *Id.*

35. Public necessity is a defense that may be invoked when a danger "affects . . . so many people that the public interest is involved," but "[t]he number of persons who must be endangered in order to create a public necessity has not been determined by the courts." PROSSER & KEETON, *supra* note 4, § 24, at 146. Any case of necessity that does not qualify as a public necessity is a case of private necessity. If this case were classified as one governed by the privilege of private necessity, it would be analogous to the hypothetical in which we broke into your locked box to obtain the drug that would save the life of the sick child. See text accompanying notes 19-22 *supra*. In other words, it would be a case of private necessity in which the defendant acted to save others, rather than the defendant's own self.

36. Professor Fleming says: "What little authority there is seems to deny such a privilege, at any rate if it would involve serious bodily harm or death." J. FLEMING, *supra* note 31, at 89.

37. Pp. 80, 95. For a discussion of this hypothetical, see Kadish, *supra* note 11, at 890. See also D'Amato, *The Speluncean Explorers — Further Proceedings*, 32 STAN. L. REV. 467, 469-75, 481-85 (1980).

38. For an excellent jurisprudential discussion of these questions in the criminal law context, see the fictional "Case of the Speluncean Explorers," in which four men who were trapped in a cave killed a fifth man and ate him in order to survive until they were rescued. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949); see also D'Amato, *supra* note 37.

infringe the one's most stringent right to his body organs.<sup>39</sup>

Although these distinctions may satisfy a moral theorist that the bystander may throw the switch, killing the one in order to save the five, courts of law might not recognize a privilege of necessity under such circumstances. Criminal courts traditionally have been reluctant to recognize a privilege of either public or private necessity in cases of murder or manslaughter, although the defendant's motive has been considered in mitigation of the punishment for the crime committed.<sup>40</sup> By contrast, the Model Penal Code section 3.02 provides that conduct believed to be necessary to avoid some harm is justifiable if "the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged."<sup>41</sup> The Model Penal Code commentaries suggest that the defense of necessity is available if a person intentionally kills one person in order to save two or more.<sup>42</sup>

Tort law can be expected to follow the criminal law of a given jurisdiction.<sup>43</sup> Thus, if the criminal law does not recognize a privilege of necessity, it can be expected that tort law will not allow the bystander to invoke a privilege of necessity either. The bystander then would be obligated to pay wrongful death damages to the one's heirs — an outcome that is contrary to Thomson's proposed resolution of the case (p. 41). On the other hand, if a jurisdiction follows the Model Penal Code, the civil courts probably would recognize the privilege of necessity.<sup>44</sup> Most likely, the civil courts would characterize the defense as a privilege of public necessity, thereby exonerating the bystander from the payment of survival and wrongful death damages altogether.<sup>45</sup> Of course, if the defense were characterized as an incomplete privilege of private necessity, then the bystander would be re-

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39. Professor Laycock, in a critique of *The Trolley Problem*, says that the "distinction between diverting an existing threat and creating a new one has no explanatory power whatever for me." Laycock, *The Ultimate Unity of Rights and Utilities*, 64 TEXAS L. REV. 407, 409 (1985). On the other hand, Laycock is surprised that Thomson does not put a greater emphasis on the fact that the transplant surgeon would infringe the healthy donor's "strongest imaginable entitlement to his own body organs." *Id.* at 408. After all, it was Thomson who wrote in *A Defense of Abortion*: "My own view is that if a human being has any just, prior claim to anything at all, he has a just, prior claim to his own body" (p. 8).

40. W. LAFAVE & A. SCOTT, CRIMINAL LAW § 5.4, at 445 (2d ed. 1986).

41. MODEL PENAL CODE § 3.02 (1980). For a discussion of the Model Penal Code provision, see W. LAFAVE & A. SCOTT, *supra* note 40, at 442-43.

42. W. LAFAVE & A. SCOTT, *supra* note 40, at 444.

43. Professor Bohlen said: "If the exigency in which [the victim's] slayers were placed was not sufficient to relieve them from criminal punishment for his murder, *a fortiori* it would not relieve them from liability to pay compensation under a death statute for the benefit of his dependents." Bohlen, *supra* note 13, at 320 n.18.

44. PROSSER & KEETON, *supra* note 4, § 24, at 148.

45. See note 34 *supra*. The professor may want to explore the possibility of shifting at least a part of the loss from the one's heirs to the five workers or to the community at large. See text accompanying note 25 *supra*.

quired to pay damages to the survivors of the one.<sup>46</sup>

What does it mean to say that the one has a right to life? Is the right to life absolute or contingent? Is there a difference between a moral theorist's answer to that question and a lawyer's answer? Should tort law be informed by moral theory? Should moral theory take into account the decisions made by judges in hard cases? These are some of the interesting questions posed by a juxtaposition of moral theory and tort law. Thomson's memorable stories in *Rights, Restitution, & Risk* both provoke and facilitate consideration of these fascinating questions.

### III. FEMINIST LEGAL THEORY<sup>47</sup>

#### A. *Building Theory in the Classroom*

Several years ago, mostly in the early 1970s, some law schools began offering courses on "Women and the Law." In many instances these courses were the direct result of student demand. Often, it was the women students who put the course materials together, before finding some cooperative professor to "teach" the course. These courses were viewed as important for the women students, because women's experiences and women's concerns had been left out of many traditional law school courses. The founding of these "Women and the Law" courses is often credited with planting the seeds for the subsequent flowering of feminist legal theory or feminist jurisprudence courses. These "Women and the Law" courses, like women's studies courses in other disciplines, offered the unique opportunity to view many unrelated fields of law from a single perspective, the woman's perspective. And that, of course, told us a lot about the position of women vis-à-vis the law.

I teach my feminist legal theory class with a view towards giving my students an opportunity to explore how different legal theories might be used to improve women's status vis-à-vis the law. I expect my students to build their own theories. Theories require a certain amount of abstraction, and yet I am a firm believer that too much abstraction is bad. The theories must be built from the ground up. By that I mean we have to begin with specific cases, both real and hypothetical. I also rely heavily on personal stories volunteered by my students.<sup>48</sup>

Judith Jarvis Thomson's essays on abortion<sup>49</sup> and privacy<sup>50</sup> are

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46. See note 35 *supra*.

47. Professor Cain wrote this section.

48. See Cain, *Teaching Feminist Legal Theory at Texas: Listening to Differences and Making Connections*, 38 J. LEGAL EDUC. (forthcoming).

49. *A Defense of Abortion*, pp. 1-19.

50. *The Right to Privacy*, pp. 117-34.

helpful in asking students to build theory. Her stories are not real stories about real people and so one should not build theory from her stories alone. But her stories are concrete and her people more real than that abstract group of people behind the veil in the "original position."<sup>51</sup>

In addition, Thomson's attempts to explain the differing responses to her trolley driver and transplant surgeon problems<sup>52</sup> have helped me to explore with my students such abstract notions as "rights" and "responsibilities" and "autonomy" and "connection." In this section, I provide a brief overview of some of the ways in which Thomson's essays can be used to add concreteness to the search for theory. I also question Thomson's emphasis on "rights" to the exclusion of "connectedness" and "relationship."

### B. *Abortion*

*A Defense of Abortion* (p. 1) was written in 1971, two years before the Supreme Court handed down its decision in *Roe v. Wade*.<sup>53</sup> It is a very narrowly focused essay, intended to poke a hole in the moral argument that abortion is always wrong because it is an act of murder. That argument, says Thomson, is usually attacked by contending that the fetus is not a person. Thomson assumes, for purposes of discussion, that the fetus *is* a person. But the fetus, like the famous violinist,<sup>54</sup> does not have an absolute right to life. Thus, abortion, even if viewed as killing a person, is sometimes morally permissible. Specifically, Thomson argues that abortion is permissible to save the life of the mother (by analogy to self-defense),<sup>55</sup> in the case of rape (by analogy to lack of consent), and when carrying the child to term would require the mother to be a Good Samaritan, as opposed to a Minimally Decent Samaritan (by analogy to the law governing the duty to rescue). That abortion is sometimes morally permissible is a sufficiently strong premise for her purposes. The premise implies, of course, that abortion is not always morally permissible.

Modern-day feminists might find her premise, because it is so narrow, not to their liking. Others may argue that her premise is irrelevant to the real issue in the abortion debate. The real issue is: Who is it who is to decide when abortion is morally permissible and when it is not?<sup>56</sup> Other feminists may even disagree with the structure of her

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51. J. RAWLS, *A THEORY OF JUSTICE* (1971).

52. *The Trolley Problem*, pp. 94-116. For a full statement of these hypotheticals, see section II.C *supra*.

53. 410 U.S. 113 (1973).

54. For a full statement of "The Famous Violinist" hypothetical, see section I *supra*.

55. For a discussion of Thomson's views on self-defense, see section II.B *supra*.

56. Professor MacKinnon says with respect to debates over the moral rightness of abortion: "My stance is that the abortion choice must be legally available and must be *women's*, but not because the fetus is not a form of life. In the usual argument, the abortion decision is made



argument, claiming that it is antifeminist because it is not woman-centered. As Professor Catharine MacKinnon comments:

Thus, for instance, Judith Jarvis Thomson's argument that an abducted woman had no obligation to be a celebrated violinist's life support system meant that women have no obligation to support a fetus. The parallel seems misframed. No woman who needs an abortion — no woman, period — is valued, no potential a woman's life might hold is cherished, like a gender-neutral famous violinist's unencumbered possibilities. The problems of gender are thus underlined here rather than solved, or even addressed.<sup>57</sup>

These critiques are understandable, but, in my opinion, they are not fair to Thomson's purpose. Remember, it was 1971 when this essay was penned. She pushed the moral debate forward by assuming for purposes of discussion that the fetus was a person with its own "right to life." She then argued from a woman's perspective that abortion is sometimes morally permissible.<sup>58</sup> And although she may not have cherished the pregnant woman to Professor MacKinnon's satisfaction, she tells a story that has valuable explanatory potential for nonpregnant persons.

"Imagine being pregnant," I say to my students. Most students, notably the men, have little experiential data to support this imaginary experience. To some, pregnancy is mystical. It is something intimately personal and, thus, not often discussed in public. Some students immediately distance themselves from the project. But now try this: "Imagine that you wake up one morning back to back in bed, connected to an unconscious famous violinist." The hypothetical is stripped of all the personal history, of all the complications that one might bring to the reality of pregnancy.

This "stripping" is both good and bad. It is bad because reality is where we live and where we make our moral (and legal) choices. It is good because transcendence of the intimately personal is necessary to enable our real conversations with others about moral choice. Thomson understands the importance of talking about concrete cases when one is developing moral theory (pp. 257-60). But she does not acknowledge the potentially different uses of real and hypothetical cases. As a teacher of feminist theory, committed to the reality of women's experiences, I must be ever cautious in stripping too much of reality from discussions of abortion. I find the story of "The Famous Violin-

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contingent on whether the fetus is a form of life. I cannot follow that. Why should women not make life or death decisions?" C. MACKINNON, *FEMINISM UNMODIFIED* 94 (1987) (emphasis in original).

57. *Id.* at 98-99 (footnote omitted).

58. Professor Robin West, in urging the development of a woman-centered "reconstructive jurisprudence," observes that "[f]rom a subjective, female point of view, an abortion is an act of self defense, (not the exercise of 'a right of privacy'). . . ." West, *Jurisprudence and gender*, 55 U. CHI. L. REV. 1, 69 (1988).

ist" valuable, but it must be accompanied by other stories, real stories, stories of women in physical pain, stories of fear, stories of humiliation.<sup>59</sup>

Thomson's essay on abortion plays another important role in developing feminist legal theory. Consider the story of the Good Samaritan, who "went out of his way, at some cost to himself, to help one in need of it" (p. 15). Now consider what a pregnant woman is being asked to do on behalf of the fetus. Certainly it is more than even the Good Samaritan did. He merely crossed the road to help a dying man. The Good Samaritan bound the injured man's wounds and took him to an inn, but he did not stay with him for anything close to nine months, nor did he risk physical pain or injury in giving aid. Thomson's point is that the law does not generally require the giving of aid (p. 16). When it does, it merely requires that the actor be a Minimally Decent Samaritan (p. 16). It does not require anyone, other than a pregnant woman, to be a Good Samaritan.<sup>60</sup>

Professor Donald Regan, relying on Thomson's basic argument about the Good Samaritan, has developed a strong equal protection argument in favor of abortion rights.<sup>61</sup> He argues in part:

To see the equal protection problem, we must look at abortion in a broader context. Life in society produces many situations in which one individual is in a position to give needed aid to another individual. That is to say, life in society offers many opportunities to be a good or bad samaritan. The objection to an anti-abortion statute is that it picks out certain potential samaritans, namely women who want abortions, and treats them in a way that is at odds with the law's treatment of other potential samaritans. Women who want abortions are required to give aid in circumstances where closely analogous potential samaritans are not. And they are required to give aid of a *kind* and an *extent* that is required of no other potential samaritan.<sup>62</sup>

Given the problems created by *Roe v. Wade*'s reliance on the right to privacy,<sup>63</sup> recent feminist writing has stressed the need for an equal protection approach to abortion.<sup>64</sup> The equal protection approach is especially important when one considers the plight of poor women

59. The National Abortion Rights Action League submitted an amicus brief in *Thornburgh v. American College of Obstetricians*, 476 U.S. 747 (1986), which contained thirty-eight real stories of abortion experiences told by women. See Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1635-37 (1987).

60. In 1971, when Thomson wrote this essay, all fifty states had laws prohibiting abortion by choice, thereby requiring pregnant women to be Good Samaritans. P. 16.

61. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979).

62. *Id.* at 1622 (emphasis in original) (footnote omitted).

63. For example, privacy arguments make abortion a matter of private choice, which is of little value to poor women who cannot afford the choice. Also, privacy arguments focus on the individual woman rather than on the collective needs of women.

64. See, e.g., C. MACKINNON, *supra* note 56, at 93-102; R. PETCHESKY, *ABORTION AND WOMAN'S CHOICE* 295-302 (1984); Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984).

who have no meaningful access to abortion. Thomson's essay provides a valuable first step in pursuit of this approach.

### C. *Privacy and Rights*

"The personal is political." This simple feminist slogan has been assigned many meanings. The most constant theme underlying the slogan's various explanations is an attack on the distinction between public and private. The personal, previously private and protected from government interference, should be politicized, made public. In accord with this theme, some feminists argue that strong support for a right to privacy is harmful to women.<sup>65</sup> Other feminists argue that privacy is an important interest, that the sex/gender system has prevented women from getting their fair share of privacy, and that feminist theory ought to focus on women's right to privacy.<sup>66</sup> Whichever way you cut it, privacy is an important topic for feminist theory.

Thomson's essay on privacy, *The Right to Privacy* (p. 117), was originally published in 1975. As with the abortion essay, it has been around long enough to engender numerous critiques.<sup>67</sup> Thomson's working hypothesis is that there is no separate right to privacy, but that instead the interests protected by privacy are all protected by other primary rights. For example, the right not to be listened to and the right not to be looked at, although part of the cluster of privacy rights, are derived from the more primary rights we have over our own persons (p. 126). Similarly, the right that our property not be looked at is derived from our more basic property rights (p. 124). In Thomson's view, the right to privacy is derivative in the following sense:

[I]t is possible to explain in the case of each right in the [privacy] cluster how come we have it without ever once mentioning the right to privacy. Indeed the wrongness of every violation of the right to privacy can be explained without ever once mentioning it. [p. 133]

Whether or not this is true in every case, it is certainly an interesting claim. And of course, it is true for every case that Thomson posits. A man's right that you not look at his pornographic picture is derived from his property rights in the picture (pp. 120-24). An opera singer's right that you not listen to her sing (in private) is derived from her rights over her person (pp. 125-26). Torturing a man to get personal information is a violation of his "right to not be hurt or harmed" (p. 129). As Thomson puts it, these people (the man with the porno-

65. For example, Professor MacKinnon says: "This right to privacy is a right of men 'to be let alone' to oppress women one at a time. It embodies and reflects the private sphere's existing definition of womanhood." C. MACKINNON, *supra* note 56, at 102 (footnote omitted).

66. See Allen, *Women and Their Privacy: What Is at Stake?*, in *BEYOND DOMINATION: NEW PERSPECTIVES ON WOMEN AND PHILOSOPHY* 233 (C. Gould ed. 1984).

67. See, e.g., Gavison, *Privacy and the Limits of the Law*, 89 YALE L.J. 421 (1980); Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFF. 26 (1976); Scanlon, *Thomson on Privacy*, 4 PHIL. & PUB. AFF. 314 (1975).

graphic picture, the opera singer, the tortured man) have their respective rights (that the picture not be looked at, that the voice not be listened to, that the body not be tortured), but not because they have a right to privacy. Instead, they have these respective rights as primary rights, and it is because they have these primary rights that we say they have a right to privacy (p. 133).

Thomson puts these thoughts forward as a tentative suggestion. She believes that thinking about the right to privacy in this way may help us to understand the nature of rights. If every time we say, "Aha, there is a violation of the right to privacy," we then push further to see if there is really some more basic underlying right, then perhaps we will remove some of the darkness that surrounds our understanding of rights.

I agree with Thomson that pushing beneath the surface of every privacy hypothetical is a useful heuristic device. I think it especially useful to focus on hypotheticals that involve women, something that Thomson does too infrequently. Consider the right not to be looked at and not to be touched. These are rights that might be waived once a person walks into a crowd. Suppose that someone looks at your left knee because you absent-mindedly left it uncovered (pp. 124-25). Thomson suggests that in such a situation you might have waived your right to have your knee not looked at. But what if you are a woman and it is your left breast, not uncovered at all, and the look is not merely a look but a leer? And what if someone in a crowd touches your left breast, not accidentally. It is all well and good to describe these invasions as invasions of your rights over your person, or even over your body, but it does strike me that there are parts of your person and of your body that are more private than others. Once we begin to make these sort of distinctions, between knees and breasts, for example, then I think we will begin to approach a deeper understanding of privacy.

Thomson's observation (that privacy rights are derivative because everything that they protect can be described without ever once mentioning privacy) tells us two different sorts of things, one about privacy and one about rights. What it tells us about privacy is linguistic. We talk less about the truly private parts of our lives, such as our most intimate sense of self, than we do about the public parts. It is easier to talk with others about the external, objective parts of ourselves, the parts that others see. Therefore, it should not be so surprising that we are able to describe large parts of "privacy" by using more public terms.

Thomson's observation also suggests to us something about rights. What it suggests is this: In the realm of the truly private, where there is only "me," it is meaningless to talk of rights. Let me put it more concretely. Imagine Robinson Crusoe on his island without his man,

Friday. Imagine that there are no other persons in existence. What would it mean to say that Robinson Crusoe has a right? A right to life, a right to property, a right over his person?

Rights, it seems to me, are dependent upon the existence of at least two persons. Rights, it seems to me, are moral descriptions of relationships. They say something about the way we think that relationships between persons ought to be. Thomson, although she does not say it in so many words, recognizes this when she says in the afterword, ". . . it seems . . . that to have a right just *is* its being the case that people may and may not treat you in these and those ways" (p. 253).

Thomson's moral theory is quite clearly based on a concept of rights. Nowhere does she explicitly focus on the importance of relationships,<sup>68</sup> a theme that has emerged in recent feminist writing about morality and law.<sup>69</sup> And yet the contingency that she is willing to assign to rights emphasizes the importance of context, including the importance of the relationships posited by the context.

Take the right to life. Again and again, Thomson emphasizes that it is not absolute, that it is contingent. It is not sufficiently absolute in the case of the fetus or the famous violinist to force involuntary servitude upon others.<sup>70</sup> Nor is it sufficiently absolute to insulate Aggressor from Victim.<sup>71</sup>

The contingency of the right to life is pressed most thoroughly in her two essays on the *Trolley Problem*.<sup>72</sup> The trolley driver, you will recall, cannot stop his runaway trolley. He is thus faced with the choice of either killing the five workers in front of him or turning the trolley, in which case he will kill only one. Thomson concludes that he may save five lives by killing the one. And in the event that the trolley driver is incapacitated, Thomson similarly concludes that a bystander at the switch may turn the trolley toward the one in order to save the five. Thomson says that the one has a right to life, but not a right that the bystander at the switch not turn the trolley.

Thomson wants to focus primarily on the *means* by which the five are saved and the one is killed. The means is the turning of the trolley. But as she soon makes clear in subsequent hypotheticals, sometimes the means (turning the trolley) infringes no right and sometimes the same means (turning the trolley) does infringe a right. It all depends.

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68. She does, however, note the unique situation of the mother and fetus as constituting a relationship upon which one might argue for unique duties of the mother. P. 11.

69. See, e.g., C. GILLIGAN, IN A DIFFERENT VOICE (1982); N. NODDINGS, CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION (1984); Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986).

70. See Thomson's essay, *A Defense of Abortion*. Pp. 1-19.

71. See Thomson's essay, *Self-Defense and Rights*. Pp. 33-48.

72. See section II.C *supra*.

And what it seems to depend on, although Thomson does not say this explicitly, is the relationship between the bystander and the one.

Consider one of Thomson's variants on the "bystander at the switch" hypothetical:

The five on the straight track are regular track workmen. The right-hand track is a dead end, unused in ten years. The Mayor, representing the City, has set out picnic tables on it, and invited the convalescents at the nearby City Hospital to have their meals there, guaranteeing them that no trolleys will ever, for any reason, be turned onto that track. The one on the right hand track is a convalescent having his lunch there; it would never have occurred to him to do so if the Mayor had not issued his invitation and guarantee. The Mayor was out for a walk; he now stands by the switch. [pp. 111-12]

Is it morally permissible for the Mayor to turn the trolley on the one? Thomson's feeling is that it is not, because the one has a right against the Mayor generated by the promise. Others conclude that he may. Thomson speculates that they "think the right less stringent than I do" (p. 112). My guess is that, instead, they are focusing on the more abstract right of the one, the "right to not be killed," rather than on the relationship which generated the additional promissory right.

My colleague, Professor Douglas Laycock, for example, is one of those who thinks the Mayor may turn the trolley. Laycock explains that the Mayor may proceed because, if it is morally permissible to take the life of the one in order to save the five, then surely it is permissible to break a promise to the one in order to save the five.<sup>73</sup> Laycock's explanation separates the abstract "right to not be killed" from the factual context in which it arises and presumes that the right of the one is the same regardless of who stands by the switch. This explanation is satisfactory if you adopt a Kantian model of impartiality in which all the persons on the track exert "equal pull" on the bystander at the switch. It is not satisfactory if you believe that personal relationships are sometimes relevant to moral choices. A feminist explanation of Thomson's intuitive response to the "Mayor at the switch" hypothetical would focus on the relationship between the Mayor and the one.<sup>74</sup> It would not focus on an abstract right.

Critical legal theorists have attacked rights theorists so often that the attack hardly bears repeating here. Rights are indeterminate and theories based on rights do not account for this indeterminacy.<sup>75</sup> Feminist legal theorists have joined the attack, pointing out that rights analysis focuses too much on the individual and begins with individual

73. Laycock, *supra* note 39, at 411.

74. See, e.g., Baier, *Hume, the Women's Moral Theorist?* in *WOMEN AND MORAL THEORY* 37 (E. Kittay & D. Meyers eds. 1987). Baier argues that Hume's moral theory, unlike Kant's, centers on the cultivation of good character traits, the most important ones being those concerning relations with others.

75. See *Symposium: A Critique of Rights*, 62 TEXAS L. REV. 1363 (1984).

male values as the norm.<sup>76</sup> As she moves from essay to essay, probing the underpinnings of each right she seeks to understand, Thomson adds support for the critical claim that rights are indeterminate. Her conclusion, however, is not that there can be no coherent theory of rights. Instead, she concludes that the theory must be one that contemplates the moral infringement of rights (p. 255). Thus, in Thomson's view, rights are not absolute, they may be infringed, and they tell us something about how people may treat each other. At the same time, they have moral force and, if infringed, the infringement leaves moral traces. It is clear to me from reading Thomson that she would place herself in what feminists describe as the justice tradition, associated with Mill, Kant, and Rawls.<sup>77</sup> And yet the more I read her stories and see her willingness to admit the contingency of rights, the more I wonder if it would not be more appropriate to place her in the Aristotelian tradition in which "moral deliberation must determine the right thing to do, at the right time, in the right place, to the right person, in the right way."<sup>78</sup> I cannot help but wonder why it is that she stays focused on the question of rights, rather than looking at the relationships that are present in the stories that she tells.

I do not mean to argue for relationships over rights as a means for solving moral dilemmas. I merely mean to suggest that focusing on rights, to the exclusion of relationships, is not particularly helpful. Thomson's hypotheticals explicitly raise questions about the meaning of rights. (What does it mean for the one worker to have a right to life in the *Trolley Problem*?) Although Thomson fails to focus on the relationships created in her hypotheticals, they are always there, behind the scenes.

The importance of these relationships is implicit, even in Thomson's own search for moral explanations. Consider the case of the surgeon who is faced with the choice of operating on one healthy patient to remove his organs in order to save the lives of five unhealthy patients. All agree that the surgeon may not proceed. But why not? Moral theory, says Thomson, must adequately explain the why not (p. 258). The utilitarian, she suggests might explain the moral rule to be applied to the surgeon by looking to the consequences. Ultimately, utility would not be served in a world in which surgeons were allowed to sacrifice their healthy patients for their unhealthy ones. And yet Thomson does not find this explanation satisfactory. As she puts it:

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76. See Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEXAS L. REV. 387, 400 (1984). At the same time, an appeal to rights has often been successful in improving the status of women. Thus, feminist litigators have a perspective on the use of rights that is more positive than the perspective of the abstract theorist. See Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986).

77. See WOMEN AND MORAL THEORY, *supra* note 74, at 4; see generally C. GILLIGAN, *supra* note 69.

78. WOMEN AND MORAL THEORY, *supra* note 74, at 8.

[It] locates the moral source of the prohibition . . . in the wrong place. Surely the reason why the surgeon must not proceed has to lie, not in what proceeding would cause other people, but in what proceeding involves doing to the young man. The unhappiness which would be caused others by the surgeon's proceeding seems to be utterly insignificant by comparison with, and thus not adequately explanatory of, the enormity of the wrong which the surgeon would be doing to the young man himself. [pp. 259-260]

Thomson attempts to locate the source of the moral prohibition in the young man himself. Her intuition is that the young man must have some sort of right. And yet her discussion focuses not on the young man, but on the surgeon and the young man together. To shift the focus from the young man individually to the relationship between the two may not solve the moral dilemma, but, for me at least, it adds explanatory power that is more satisfying.

#### IV. CONCLUSION

In *Rights, Restitution, & Risk*, Judith Jarvis Thomson attempts to demonstrate the validity of general ethical principles by testing them against specific hypothetical cases. Her aim is to build moral theory that can explain specific data, predict future data, and do so with morally satisfactory explanations. Her process is to use examples that are concrete and that pose significant moral dilemmas. Bernard Williams says of Thomson's examples: "They are starkly presented, and notably unsentimental" (book cover).

We, as law teachers, attempt to demonstrate the right or wrong outcome in a particular case by applying similar general principles. Our point is to help our students build an understanding of legal theory. There is a striking, and at times dangerous, similarity between the way in which we teach law and the way in which Professor Thomson teaches moral philosophy.

Too often we, as law teachers, teach from case books in which the editors, concerned with the legal rule of the case, have edited out the factual richness. Too often we teach a case as though it were an abstract hypothetical, disconnected from the circumstances in which it in fact arose. And when we create our own hypotheticals, we often talk of abstract plaintiffs and defendants, of gender-neutral *A*'s and *B*'s.

Thomson's hypotheticals and our edited cases, pared of their full facts, are valuable teaching tools. A good teacher can use the starkness of such stories to capture a student's attention. But when such stories are stripped of real human context, our intuitive reactions to them may be distorted. Therefore, when we are building moral and legal theory in the classroom, we must be sensitive to this risk. When stories are used as foundations for theory, perhaps they should be told in full.